In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1507

SAMUEL H. SLOAN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-A to 4-A) is reported at 527 F.2d 11.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1975. A petition for rehearing was denied on January 21, 1976 (Pet. App. 5-A). The petition for a writ of certiorari was filed on April 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a person claiming to be aggrieved by orders of the Securities and Exchange Commission suspending trading for successive 10-day periods in the

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common stock of a corporation may obtain review in the court of appeals without first seeking relief from the Commission.

2. Whether the Commission is precluded from renewing a summary 10-day suspension.

3. Whether the foregoing issues have become moot because no order summarily suspending trading is any longer in effect.

STATUTES INVOLVED

Section 19(a) of the Securities Exchange Act of 1934, 48 Stat. 898, 15 U.S.C. 78s(a), in effect when the trading suspension orders were issued, provided in pertinent part:

> The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—
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> * * * * *
>
> (4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

When these orders were entered, Section 15(c)(5), 48 Stat. 895, as amended, 15 U.S.C. 78*o*(c)(5), provided:

> If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading, otherwise than on a national securities exchange, in any security (other than an exempted security) for a period not exceeding ten days. No broker or dealer shall make use of the mails or of any means or instrumentality

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> of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended.

In amendments to the Securities Exchange Act that became effective on June 4, 1975, the Commission's suspension powers were consolidated in a new Section 12(k) of the Act, Pub. L. 94-29, 89 Stat. 118, 15 U.S.C. 78*l*(k), which is the basis for each trading suspenison order issued since that date. The new Section 12(k) is set forth at Pet. 5.

STATEMENT

Petitioner sought review, in a court of appeals, of certain orders of the Securities and Exchange Commission that had summarily suspended trading in the common stock of Canadian Javelin, Limited ("CJL"). The petition for review challenged eight 10-day trading suspension orders that had been issued between November 29, 1973, and November 4, 1974 (Pet. App. 7-A). The court of appeals dismissed the petition, noting that the series of suspension orders continued only until January 26, 1975, and that when it heard argument a new series of suspension orders beginning on April 30, 1975, was in effect (Pet. App. 1-A to 2-A). The latter series of suspensions terminated on May 2, 1976, and no suspension order is now in effect.

Each of the Commission's orders issued during these periods suspended trading in CJL common stock for a period of 10 days, pursuant to statutory authority. Each of these trading suspensions was based upon an independent determination by the Commission that such suspensions were required in the public interest and for the protection of investors.

The court of appeals held that all of the claims in petitioner's "blunderbuss attack" were "frivolous," except for his contention that the Commission lacked the authority to issue successive 10-day suspensions for an indefinite period

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(Pet. App. 3-A).[1] The court of appeals stated, however, that it could not decide the merits of that claim "on the record before us," because petitioner's pleadings covered "only the *first* series of suspensions, which have now terminated" (*ibid.*; emphasis in original), and because the record was "unclear" with respect to the reasons for the second series of suspensions. After noting that petitioner might wish to challenge the second series of suspensions as well as the first, and that the Commission was "willing * * * to grant [petitioner] some sort of administrative hearing, thus satisfying any possible exhaustion [of remedies] requirement while also contributing to the record," the court of appeals dismissed the petition for review "without prejudice to [petitioner's] repleading after an administrative hearing * * * from which judicial review may be sought" (Pet. App. 3-A, 4-A; footnote omitted).[2]

On or about March 15, 1976, prior to termination of the second series of trading suspensions, petitioner filed a petition with the Commission seeking review of all of the suspensions of trading in CJL securities from November 29, 1973, up to and including the date that his petition might be decided. He asked, among other things, that the Commission refrain from issuing any further suspensions of trading in the shares of CJL common stock and that the Commission declare that the previous trading suspensions

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[1]On March 4, 1976, the court of appeals, affirming the district court's dismissal of a complaint filed by petitioner, which, "[i]n effect * * * [challenged] the entire structure of securities regulation in the United States," reiterated its view that petitioner's "blunderbuss attack" on the Commission's authority in the instant case is "frivolous." *Sloan* v. *Securities and Exchange Commission*, No. 75-7283, decided March 4, 1976 (see Pet. App. 11-A).

[2]On April 23, 1976, petitioner filed in the court of appeals a petition for review of the trading suspension orders comprising the second series of suspensions. *Samuel H. Sloan* v. *Securities and Exchange Commission*, No. 76-4110.

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were illegal. On April 21, 1976, after considering the matters contained in Mr. Sloan's petition, an affidavit submitted in support thereof, and the reasons for which the trading suspension orders had been issued, the Commission decided that the public interest and the protection of investors required it to suspend trading in CJL common stock for an additional 10 days. [3] Accordingly, trading was suspended from April 23, 1976, until May 2, 1976, when the second series of suspensions terminated.[4]

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[3]The Commission's notice reflecting its disposition (41 Fed. Reg. 17983-17984) is reproduced as Appendix A, *infra*, pp. 1a-3a. It explains that the first series of suspensions was based on the Commission's institution of a civil injunctive action, on November 29, 1973, alleging that CJL and certain of its principals had violated the federal securities laws in connection with the company's filing of false reports with the Commission and CJL's dissemination of "a series of press releases containing false and misleading information relating to its purported development of Panamanian mineral properties." With respect to the second series of suspensions then in effect, the Commission stated that it suspended trading "as a result of a lack of information concerning pending investigative action by Canadian regulatory authorities." In addition: (a) criminal informations returned in Canada indicated that CJL common stock "may have been artificially manipulated on two Canadian stock exchanges * * * "; (b) the Commission was "actively investigating, among other things, possible manipulation of the stock in the United States securities markets"; (c) private civil suits were pending in Canada concerning control of CJL and a Canadian provincial court had recently installed a new board of directors for the company; and (d) CJL had been delinquent, since March 31, 1976, "with respect to the filing of its 10-K report."

[4]On April 22, 1976, the Commission announced the adoption of informal procedures "by which any person adversely affected by a summary suspension pursuant to Section 12(k) of the Securities Exchange Act may obtain prompt consideration by the Commission of the reasons such person believes the continued suspension is not in the public interest or is not required for the protection of investors." Securities Exchange Act Release No. 12361, reproduced as Appendix B, *infra*, pp. 4a-5a. See also 41 Fed. Reg. 18290. Although the Commission announced the adoption of these procedures after announcing the disposition it had made of petitioner's petition, the criteria

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ARGUMENT

The important question whether the Securities and Exchange Commission has the statutory authority to order successive 10-day trading suspensions is, as the court of appeals held, not ripe for review. Nor is review necessary, for not only is there no conflict among the circuits, but there never has been a determination of that question by any court, including the court of appeals in this case. What is more, because no order suspending trading in the stock of CJL is now in effect, this case may be moot.

1. The court of appeals correctly held that, before petitioner may obtain review of Securities and Exchange Commission orders suspending trading, he must first present his arguments to the Commission (Pet. App. 4-A).[5] This Court has repeatedly held that judicial review must await completion of the administrative process.[6] The court of appeals found (Pet. App. 4-A) that petitioner's failure to have sought relief from the Commission resulted in an

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set forth in the Commission's release concerning the informal procedures were substantially followed in considering petitioner's objection to the CJL suspensions.

[5]At the time the petition for review was filed, Section 25(a) of the Securities Exchange Act, 48 Stat. 901, as amended, 15 U.S.C. 78y, provided:

> No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission.

The Act, as amended in June 1975, now provides (Section 25(c)(1), 89 Stat. 159):

> No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

[6]See, *e.g.*, *Renegotiation Board* v. *Bannercraft Clothing, Inc.*, 415 U.S. 1, 20-25; *Securities and Exchange Commission* v. *Otis & Co.*, 338 U.S. 843.

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"insurmountably sparse" record for it to review. Although the Commission had not then announced any procedures for objections to be made to 10-day trading suspensions of securities—such objections rarely having been made—the Commission had not declined to consider objections; indeed, the Commission considered the objections subsequently made by petitioner.

2. In any event, petitioner's claim that the Commission cannot suspend trading for successive 10-day periods is incorrect.[7] When it enacted the Securities Exchange Act in 1934, Congress gave the Commission suspension power with respect to trading on national securities exchanges (Section 19(a)(4)), and the legislative judgment was reconfirmed in 1964 when this power was enlarged to reach trading in securities "otherwise than on a national securities exchange" (Section 15(c)(5)). These provisions were consolidated in amendments to the Securities Exchange Act that became effective in June 1975 (new Section 12(k), 89 Stat. 118).

Although these statutes do not expressly authorize the Commission to repeat the 10-day trading suspensions, Congress recognized that the Commission was so using its authority, and reenactment of the statute in light of this recognition is a strong indication that the power is consistent with the congressional will. When Congress expanded the Commission's authority in 1964 to embrace over-the-counter trading, the Senate Committee Report stated (S. Rep. No. 379, 88th Cong., 1st Sess. 66-67 (1963) (emphasis added)):

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[7] The availability of a prompt administrative hearing after suspension is begun, followed by prompt judicial review, satisfies the procedural requirements of the due process clause. See *Commissioner of Internal Revenue* v. *Shapiro*, No. 74-744, decided March 8, 1976, slip op. 14-18. See also Freedman, *Summary Action by Administrative Agencies*, 40 U. Chi. L. Rev. 1 (1972).

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> The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the ten-day period, it determines that another suspension is necessary. The committee *accepts this interpretation.* At the same time the committee recognizes that suspension of trading in a security is a drastic step and that prolonged suspension of trading may impose considerable hardship on stockholders. The committee therefore expects that the Commission will exercise this power with restraint and will proceed with all diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible.

3. No order of the Commission suspending trading in CJL stock is now in effect. Whether or not the Commission might ever again suspend trading in CJL stock is purely a matter of conjecture, as is the question whether petitioner, if that event should occur, would again claim to be aggrieved. Cf. *Securities and Exchange Commission* v. *Medical Committee for Human Rights*, 404 U.S. 403, 406. Accordingly, this case probably is moot.[8]

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[8]Because each suspension lasts but 10 days, a challenge to a single suspension might survive the suspension's expiration if it raised issues "capable of repetition, yet evading review." *Weinstein* v. *Bradford*, 423 U.S. 147, 148-149; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498. The suspensions of CJL stock have aggregated lengthy periods, however. Petitioner's reluctance to present his complaint to the Commission in the first instance, not the short duration of the Commission's orders, has frustrated effective judicial review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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Solicitor to the Commission,

FREDERICK B. WADE,
Attorney,
Securities and Exchange Commission.

MAY 1976.

DOJ-1976-05

APPENDIX A

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

April 21, 1976

IN THE MATTER OF TRADING IN SECURITIES OF

CANADIAN JAVELIN LTD.

Securities Exchange Act of 1934 Section 12(k)

NOTICE OF SUSPENSION OF TRADING

On March 11, 1976, the Commission received a petition from Mr. Samuel H. Sloan seeking review of all of the suspensions of trading in Canadian Javelin Ltd. securities from November 29, 1973, to date. Mr. Sloan asked, among other things, that the Commission refrain from renewing the trading suspension of Canadian Javelin Ltd. and that the Commission declare that the previous trading suspensions were illegal.

Mr. Sloan states that he is the owner of 13 shares of Canadian Javelin Ltd., that in the past he has engaged in substantial purchases and short sales of shares of that stock, particularly during 1973 prior to a suspension of trading beginning on November 29, 1973.

On that date the Commission not only suspended trading of Canadian Javelin common stock, but also instituted a civil injunctive action against it and certain of its principals, charging violations of the registration and antifraud provisions of the Securities Act of 1933; of antifraud provisions of the Securities Exchange Act of 1934, as well as of annual and periodic reporting

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requirements of that Act. In addition, it was charged that false reports were filed with the Commission by Canadian Javelin Ltd. and that the company had disseminated a series of press releases containing false and misleading information relating to its purported development of Panamanian mineral properties. This resulted in a series of suspensions which concluded on January 26, 1975.

According to criminal informations returned in Canada, it appears that the common stock of Canadian Javelin may have been artificially manipulated on two Canadian stock exchanges, and that this was continuing after January 26, 1975. The Commission is actively investigating, among other things, possible manipulation of the stock in the United States securities markets. The Commission on April 29, 1975, again suspended trading as a result of a lack of information concerning pending investigative action by Canadian regulatory authorities.

In addition, a number of private civil suits are pending in Canada involving a dispute regarding control of the company. A Canadian provincial court recently issued an order installing a new board of directors and this order is now on appeal.

Mr. Sloan pointed out that the most recent annual report issued by by [*sic*] Canadian Javelin Ltd. contains an earnings statement and a balance sheet of Canadian Javelin Ltd., both of which are certified by the accounting firm of Lee & Martin. Since March 31, 1976, however, the company has been delinquent with respect to the filing of its 10-K report.

Mr. Sloan also contends that the trading suspension aids Mr. Doyle to the detriment of United States stockholders and concludes from this "that in all probability Mr. Doyle is bribing a person or persons at the SEC in order to bring about repeated suspensions of Canadian

Javelin Ltd." The facts he alleges in no way support this speculation.

Accordingly, it appearing to the Securities and Exchange Commission that the summary suspension of trading in the securities of Canadian Javelin Ltd. being traded on a national securities exchange or otherwise is required in the public interest and for the protection of investors;

THEREFORE, pursuant to Section 12(k) of the Securities Exchange Act of 1934, trading in such securities on a national securities exchange or otherwise is suspended, for the period from April 23, 1976, through May 2, 1976.

By the Commission.

/s/George A. Fitzsimmons
George A. Fitzsimmons
Secretary.

APPENDIX B

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

SECURITIES EXCHANGE ACT RELEASE NO. 12361/
April 22, 1976

SUMMARY SUSPENSIONS

The Securities and Exchange Commission today announced the adoption of procedures by which any person adversely affected by a summary suspension pursuant to Section 12(k) of the Securities Exchange Act may obtain prompt consideration by the Commission of the reasons such person believes the continued suspension is not in the public interest or is not required for the protection of investors. Section 12(k) authorizes the Commission summarily to suspend trading in securities for 10-day periods, if in its opinion the public interest or the protection of investors so requires.

The usual purpose of a suspension is to alert the investing public to the fact that there is insufficient public information about the issuer upon which an informed investment judgment can be made or that the market for the securities may be reacting to manipulative forces or deceptive practices. Consequently the primary issues normally to be considered by the Commission in determining whether or not 10-day suspensions should be instituted or renewed are whether or not there is sufficient public information upon which to base an informed investment decision or whether the market for the security appears to reflect manipulative or deceptive activites.

If any person adversely affected by such suspension or who would be adversely affected by the renewal of the suspension desires to show that such suspension is not

necessary in the public interest or for the protection of investors, he may petition the Commission that it not renew the suspension. Such petition, which may be in the form of a letter or other statement, should set forth with particularity the facts upon which petitioner relies and should be sworn to by the petitioner or an authorized officer of the petitioner.

If the petitioner so requests in the petition, and if upon examination of the petition the Commisssion is of the opinion that there is a genuine issue as to any material fact, the Commission will provide an opportunity for prompt presentation of all material facts. If no such opportunity is requested in the petition or if in the opinion of the Commission there is no genuine issue as to any material fact, the Commission will determine the issue upon the basis of the information contained in the petition and any other relevant facts known to the Commission.

The Commission will not be disposed to grant any such petition if the petitioner or any one affiliated with the petitioner shall fail to cooperate in supplying relevant information to the Commission or shall in any way obstruct any inquiry by the Commission into the relevant facts.

By the Commission.

/s/ George Fitzsimmons

George Fitzsimmons
Secretary